Supreme Court U.S.
FILED
NOV 5 - 2008
OFFICE OF THE CLERK

No. 08-448

IN THE

Supreme Court of the United States

CABLE NEWS NETWORK, INC. ET AL,
Petitioners,

v.

CSC HOLDINGS, INC. AND CABLEVISION SYSTEMS CORP.,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF SCREEN ACTORS GUILD, INC. AND WRITERS GUILD OF AMERICA, WEST, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

ANTHONY R. SEGALL
ROTHNER, SEGALL & GREENSTONE
510 S. Marengo Ave.
Pasadena, CA 91101
Telephone: (626) 796-7555
Facsimile: (626) 577-0124
Counsel for Amicus Curiae Writers Guild of America, West, Inc.

DUNCAN CRABTREE-IRELAND
Counsel of Record
DANIELLE S. VAN LIER
SCREEN ACTORS GUILD, INC.
5757 Wilshire Blvd., 7th Fl.
Los Angeles, CA 90036
Telephone: (323) 549-6627
Facsimile: (323) 549-6624
Counsel for Amicus Curiae Screen Actors Guild, Inc.

November 5, 2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The Entertainment Industry is a Delicate Structure of Relationships, Rights, and Responsibilities and Requires a Certain Degree of Predictability to Function Properly 5

II. Actors' and Writers' Compensation is Dependent on the Copyright Owners' Licensed Exploitation of their Creative Works and Will Be Negatively Impacted by the Second Circuit's Decision 7

III. By Delivering Programs to Customers for a Subscription Fee When They Want It, Cablevision's RS-DVR Service Replaces Licensed Video-On-Demand Services for Which Actors and Writers Would Otherwise Receive Compensation 11

IV. Widespread Implementation of a Subscription Service like the RS-DVR Could Potentially Affect the Commercial Production Industry 12

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008) 12

Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) 3

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) 3

Twentieth Century Fox Film Corp. v. Cablevision Systems Corp., 478 F. Supp. 2d 607 (S.D.N.Y. 2007) 11

Other Authorities

2004 WGA Theatrical and Television Basic Agreement 8, 9

2005 SAG Television Agreement 8

Brian Stetler, *A Ruling May Pave the Way for Broader Use of DVR*, N.Y. Times, Aug. 5, 2008 at C8 ..... 14, 15

Gary Levin, *The newest characters on TV shows: Product plugs*, USA Today, September 20, 2006 at 1A 14

Producer-SAG Codified Basic Agreement of 2005 9

INTEREST OF THE *AMICI CURIAE*[1]

Amici (collectively referred to herein as the "Guilds") are labor unions representing artists, including among others, actors and writers in the motion picture, television, commercial and new media industries

Amicus Screen Actors Guild ("SAG") is the nation's largest labor union representing working actors. Established in 1933, SAG represents over 120,000 actors who work in film and digital television, industrials, commercials, video games, music videos and all other new media formats. The Guild exists to enhance actors' working conditions, compensation and benefits and to be a powerful, unified voice on behalf of artists' rights.

Amicus Writers Guild of America, West, Inc. ("WGAW"), whose predecessor organization was also founded in 1933, is a labor organization and the collective bargaining representative for approximately 11,000 professional writers in the motion picture, television and new media industries. As the bargaining representative of the creators of audiovisual content, the WGAW has a significant

---

[1] Pursuant to Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief.and have consented to the filing in documents on file with the Court.

interest in the protection of copyrighted material against infringement.

The Guilds have collective bargaining agreements with all of the major motion picture, and television production companies, television networks, and commercial producers. These collective bargaining agreements govern the wages, hours, and working conditions of the Guilds' members.

The Second Circuit's decision will have a significant negative impact on the Guilds' members. A service such as the RS-DVR has the potential to reduce the value of creative works by diminishing, or even eliminating, the value of certain exploitation "windows." The Guilds' members rely on residuals – deferred compensation based on the continuing use of the creative works – as an important source of income. As the value of the exploitation windows is diminished or eliminated, so too are the incomes of the Guilds' members. Accordingly, the Guilds and their members have a significant interest in the outcome of this litigation.

SUMMARY OF ARGUMENT

As the petition for *certiorari* demonstrates, this case warrants review by the high court because it presents critical questions about the application of copyright law to new technologies that are rapidly changing the face of the entertainment industry. Petitioners point out that this litigation is part of a line of decisions that includes *Sony*[2] and *Grokster*[3]: cases that had at their core the question of whether copyright holders had a right to protect their creative works from new business models that exploit advances in technology to circumvent copyright. As in those cases, the outcome in the case at bar will affect not just the copyright owners, but the livelihoods of artists who have negotiated, through collective bargaining, compensation based on the copyright owner's revenue for uses of their works.

The entertainment industry relies on a fragile balance of relationships, rights and responsibilities that are fundamental to its successful operation. The economic interests of Guild members depend on that balance as a significant part of their income derives from the copyright owners' ability to monetize their creative works. Cablevision, however, risks upsetting this balance with its RS-DVR service, which is functionally identical to an otherwise

---

[2] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

[3] *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

licensed window of exploitation – video-on-demand ("VOD").

For decades, the Guilds have collectively bargained residual formulas based on the exploitation of creative works over their lifetime. Guild members receive ongoing income as the works are exploited in various consumer markets. An unlicensed service, such as the RS-DVR, which interrupts the flow of revenue to content owners by supplanting an otherwise licensed window, jeopardizes the Guild members' livelihoods. This is of particular concern during difficult economic times.

The Second Circuit's decision, if allowed to stand, will have a potentially destabilizing impact on the entertainment industry. Its effect will be felt not just by the copyright owners or licensees, but by the tens of thousands of individuals whose careers and livelihoods depend at any given time on the copyright owners' ability to generate revenue from their copyrights.

The Guilds therefore urge this Court to grant the petition for a writ of *certiorari*.

ARGUMENT

I. The Entertainment Industry is a Delicate Structure of Relationships, Rights, and Responsibilities and Requires a Certain Degree of Predictability to Function Properly

The entertainment industry is much like a Jenga[4] puzzle, with various relationships, rights and responsibilities forming the building blocks of its structure. These blocks include the copyrights (including all ancillary and related rights) in the creative works, the ability of copyright holders to license their works in various (usually serial) windows of exploitation, and the Guilds' collective bargaining agreements, which provide for compensation to artists based in part on the revenue from that exploitation. When any of these blocks is eliminated or altered, the stability of the structure is threatened. Yet that is exactly what the Second Circuit has done by endorsing Cablevision's Remote Storage Digital Video Recorder ("RS-DVR") service. It has removed a block from the structure by allowing a commercial enterprise to design and operate a service that operates, without license, in an otherwise licensed window.

---

[4] As described on Wikipedia: "Jenga is a game of physical and mental skill, marketed by Hasbro, in which players remove blocks from a tower and put them on top." Fifty-four blocks are stacked in a tower eighteen levels high. Players take turns removing a block from within the tower and placing it on top while trying not destabilize the tower and cause it to topple, thus ending the game. Wikipedia: Jenga, http://en.wikipedia.org/wiki/Jenga (last visited October 30, 2008)

The value of a creative work in the entertainment industry is based on revenues earned during discrete windows of exploitation throughout its lifetime. For example, the typical life cycle of a theatrical motion picture would include a window of theatrical release, followed by a release to DVD and pay-per-view, then pay television (including video-on-demand), and finally broadcast and/or cable television.[5] It might also be made available for licensed download on the Internet concurrently with or between other windows. Some windows will overlap and some will be revisited later in the work's lifetime, either through existing licenses or new ones.

Long before a project begins production – often when the project is still just an idea being floated about a production company – the value of the contemplated work is estimated based on projections of potential revenue in each exploitation window. Content creators make decisions about what projects to "greenlight", which writers and directors to hire, which actors to cast, where to shoot, and countless other issues based on settled understandings about the marketplace. Creative talent, particularly actors and writers, depend and rely on the content

---

[5] A typical television series will run first on a television or cable network and might re-run multiple times within that same season. A recent practice is for episodes of the series to be available for viewing on the Internet – either ad-supported or through paid downloads - as early as the next day following its first run. A successful series will eventually be syndicated to other broadcast or cable channels. Frequently, television series, whether successful or just well-received, are released to DVD.

creators' ability to maximize revenue from each window for their continuing livelihood.

Any unauthorized use of a copyrighted work upsets the balance within this commercial structure. This is the case when pirated DVDs are sold at swap meets. But it is also the case when an established content distributor adapts new technologies for the express purpose of defeating the rights of copyright owners. And it is particularly destabilizing when the new technology resembles and threatens to supplant an existing licensed window of exploitation.

Cablevision's RS-DVR is just such an unauthorized and destabilizing use.

II. Actors' and Writers' Compensation is Dependent on the Copyright Owners' Licensed Exploitation of their Creative Works and Will Be Negatively Impacted by the Second Circuit's Decision

Actors and writers receive compensation at various stages of a creative work's life-cycle. For decades, the Guilds have collectively bargained with the producers and distributors of creative works to ensure fair compensation for their members – the very talent without which the creative works could not be produced. Pursuant to the Guilds' collective bargaining agreements, actors and writers receive two primary types of compensation - initial compensation when the work is created and residuals for continued exploitation of the work.

Under the Guilds' collective bargaining agreements, as a creative work is licensed to new markets or re-run on television, the actors and writers receive additional compensation in the form of residuals. Some residuals, particularly those for television series, are paid based on a set formula whereby the creative talent receives payment each time an episode is aired.[6] Other forms of residuals, particularly for the cable and pay television markets, are based on a percentage of the revenue earned by the work's copyright owner or distributor for licensing the work to that market.[7] As a result, any

---

[6] For example, Section 18 of the 2005 SAG Television Agreement provides that when a program is rerun on a network in prime time each principal performer shall receive "one hundred percent (100%) of his 'total actual compensation' for each such rerun," while reruns in syndication and on a network other than during prime time are paid on a descending scale based on the performer's "total applicable minimum salary" (i.e. the minimum salary set forth in the Television Agreement).

Similarly, Article 15 of the 2004 WGA Theatrical and Television Basic Agreement provides that when a program is rerun on a network in prime time each credited writer's compensation shall be "not less than one hundred percent (100%) of the writer's applicable minimum compensation", while reruns in syndication and on a network other than during prime time are paid on a descending scale.

[7] For example, Section 18.1 of the 2005 SAG Television Agreement provides that "upon release... to basic cable of product initially produced for free television, as to which free television residuals would otherwise be payable, Producer shall pay to [SAG], for rateable distribution to the performers, [a] percentage of distributor's gross receipts", as that term is defined in the agreement, presently equal to six percent (6%). Section 20 provides a similar formula for television product released to pay-television. The Producer-SAG Codified Basic Agreement of 2005 provides similar formulas for release of

reduction in that revenue received by the copyright owner or distributor directly affects the residuals received by creative talent.

The Guilds and copyright owners, including most of the Petitioners, have collectively bargained residuals formulas for nearly six decades. These formulas have frequently been the subject of heated negotiations and, on more than one occasion, strikes. In fact, residuals were at the forefront of the recent WGA strike, and in the still-ongoing SAG negotiations with the content owners.[8] Residuals formulas for VOD and other forms of emerging technology have been the subject of considerable effort in the Guilds' most recent round of

---

theatrical product to the free television (including basic cable) and pay television windows.

Similarly, Article 58 of the 2004 WGA Theatrical and Television Basic Agreement provides that "[u]pon release... to basic cable of product initially produced for free television, as to which free television residuals would otherwise be payable, Company shall pay, in the aggregate, to the credited writer or writers... [a] percentage of the Company's accountable receipts", as that term is defined in the agreement, presently equal to two percent (2%) or one and two-tenths percent (1.2%) for theatrical product released to basic cable. Article 51 provides similar formulas for release of television and theatrical product to the pay television window and Article 15 provides the formula for theatrical product released to the free television window.

[8] The WGA's negotiations with the content owners concluded with members ratifying its agreement on February 25 after a 100-day strike. SAG's negotiations with the content owners remain unconcluded, with certain residuals, particularly residuals for content distributed in new media, being one of the key points of on-going disagreement between the parties.

negotiations for their television and theatrical contracts.

As technology has evolved, so have the residuals provisions in the Guilds' collective bargaining agreements. The concept of residuals was first discussed in the 1940s due to changes in television production and the growing ability to record programming for later re-broadcast. Residuals for re-runs of television programs were first recognized in the Guilds' collective bargaining agreements in the early 1950s and then in 1960 for motion pictures that were broadcast on television. By the early 1970s, the Guilds and content owners had collectively bargained provisions for the "Supplemental Markets" – pay television (which includes VOD) and videocassette (which is understood to include DVD).[9] In the 1980s, residuals were negotiated for exploitation of content released to and created for basic cable. In 2001, WGA and SAG negotiated sideletters to their respective agreements, under which content owners acknowledged the obligation to pay residuals for certain content distributed over the Internet.

Residuals are a crucial source of income that can often be the lifeblood of the working actor and writer, particularly in difficult economic times.[10] Because residuals are paid throughout the lifetime of a project as that project is released in different

---

[9] The formula for calculating those residuals was altered in 1980 in response to changes in the industry.

[10] In 2007, for example, residuals accounted for roughly 36% of earnings by principal actors under SAG's Television and Theatrical contracts.

exploitation windows, they can provide a flow of income to creative employees whose work is intermittent by its very nature. This important earnings stream is completely dependent on the content owners' ability to maximize revenues received for licensing rights to other links in the distribution chain. When that chain is interrupted by an unlicensed service that usurps an otherwise licensed market, so too is the actor's and writer's livelihood.

III. By Delivering Programs to Customers for a Subscription Fee When They Want It, Cablevision's RS-DVR Service Replaces Licensed Video-On-Demand Services for Which Actors and Writers Would Otherwise Receive Compensation

The RS-DVR service is a commercial service for which Cablevision receives a subscription fee from its users. Although it resembles a traditional set-top storage digital video recorder ("STS-DVR"), it is quite different. In fact, is "more akin to VOD than to a VCR, STS-DVR, or other time-shifting device." *Twentieth Century Fox Film Corp. v. Cablevision Systems Corp.*, 478 F. Supp. 2d 607, 619 (S.D.N.Y. 2007). Unlike an STS-DVR or other time-shifting device, Cablevision's RS-DVR is a subscription-based service that requires an on-going relationship with Cablevision.

As the district court points out "the RS-DVR bears a striking resemblance to VOD – a service that Cablevision provides pursuant to licenses negotiated with programming owners." *Id.*. Likewise, the

Second Circuit acknowledged that, in its operation, "the RS-DVR more closely resembles a VOD service, whereby a cable subscriber uses his remote and cable box to request transmission of the content, such as a movie, stored on computers at the cable company's facility." *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 125 (2d Cir. 2008) *citing* 478 F. Supp. 2d at 612.

Pursuant to the Guilds' agreements with the content owners, actors and writers are entitled to residuals based on the license fees paid by cable companies for the right to exploit creative content in the video-on-demand window. The Guilds have spent considerable time and effort negotiating compensation terms for this window. By usurping this exploitation window without negotiating and paying appropriate license fees, Cablevision has unjustly enriched itself – not just at the expense of the copyright owners, but also at the expense of the actors and writers who created the content.

IV. Widespread Implementation of a Subscription Service like the RS-DVR Could Potentially Affect the Commercial Production Industry

The advent and proliferation of time-shifting technology – from the first VCRs to the DVR – has changed the way consumers receive commercial advertisements. As technology has changed, the advertisers also have had to change and adapt how they convey their messages. The RS-DVR service is an advance that can lead to even more drastic changes in advertising practices. It goes beyond

private time-shifting by consumers in the home because, like VOD, it is a commercial service through which Cablevision (not the home viewer) provides the programming when its subscribers want it, and in the process supplants an otherwise licensed window of exploitation.

Just as the content creators rely on license fees to fund production of their content, the broadcast and cable industry rely on revenue from selling advertising time to license the content. As time-shifting technology proliferates, the broadcasters and cable networks will need to find ways to make up for lost commercial revenue. One common practice is the practice of "product placement" whereby a commercial product (such as, for instance, a can of Coca-Cola) is placed in one or more scenes of a television show. While this practice has existed for decades in the United States in both television and movies it has evolved into a new and exponentially growing form of "product integration".

"Product integration" is the practice of inserting or intertwining a product into the story line of television program for payment or other consideration. The previously harmless can of Coke now plays an integral role in the plot of a particular episode which generally extols the virtues of Coca-Cola. This practice has arisen from advertisers' concerns about consumers' ability to bypass traditional commercial interruptions with new consumer technologies such as DVRs, as well as Internet distribution of content. As the USA Today recently noted, "[r]ather than exist as mere props, products are being woven more tightly into story

lines as crucial plot points of subjects of dialogue, making ad messages impossible to skip." Gary Levin, *The newest characters on TV shows: Product plugs*, USA Today, September 20, 2006 at 1A.

The creative community has become increasingly concerned with the rising use of stealth advertising in the form of product placement and product integration on broadcast television. Writers typically have little control over the commercial messages they are required to weave into the story line and actors are routinely asked at the last minute to perform lines endorsing a product. This practice of "forced endorsement" can ultimately foreclose other, legitimate endorsement opportunities for actors and thereby reduce their earning capabilities.

The RS-DVR service, which requires no additional equipment for the user, can lead to the further proliferation of on-demand time-shifting technology to a much broader audience in a very short time. One analyst estimates that with services such as the RS-DVR, "DVR penetration could now jump to north of 60 percent of cable households (that is, all digital cable subscribers)." Brian Stetler, *A Ruling May Pave the Way for Broader Use of DVR*, N.Y. Times, Aug. 5, 2008 at C8. Such proliferation will only hasten the advertisers' need to find new forms of revenue through practices such as product integration.

But even more significantly, because the RS-DVR stores its data on centrally located servers under its control, Cablevision potentially has the capability to "refresh" the advertising that is associated with each

show. *Id.* Aside from the impact on the commercial industry, this ability to alter content begs the question of what other changes a company like Cablevision could make to existing content saved on its servers. It seems highly within the realm of possibility that a company utilizing a technology and service such as the RS-DVR could replace content, whether commercial advertisements or otherwise, it deems objectionable, thus stunting the free flow of ideas and messages to the consuming public without its knowledge.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ANTHONY R. SEGALL
ROTHNER, SEGALL & GREENSTONE
510 S. Marengo Ave.
Pasadena, California 91101
Telephone: (626) 796-7555
Facsimile: (626) 577-0124
Counsel for Amicus Curiae Writers Guild of America, West, Inc.

DUNCAN CRABTREE-IRELAND
Counsel of Record
DANIELLE S. VAN LIER
SCREEN ACTORS GUILD, INC.
5757 Wilshire Blvd., 7th Fl.
Los Angeles, CA 90036
Tel.: (323) 549-6627
Facsimile: (323) 549-6624
Counsel for Amicus Curiae Screen Actors Guild, Inc.

November 5, 2008